

# MONTANA PUBLIC DEFENDER COMMISSION

## Minutes

Office of the State Public Defender, Central Office  
44 W. Park  
Butte, Montana

**November 9, 2007**

*(Approved at the February 29, 2008 Commission Meeting)*

### Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Jim Taylor at 8:45 a.m.

### Commissioners Present

Dan Donovan, Great Falls; Jennifer Hensley, Butte; Stephen Nardi, Kalispell; Mike Sherwood, Missoula; Vic Miller, Harlem; Tara Veazey, Helena; Wendy Holton, Helena; and James Park Taylor, Missoula.

### Commissioners Absent

Caroline Fleming, Miles City.

### Interested Persons

Scott Crichton, American Civil Liberties Union of Montana; Brent Doig, Office of Budget and Program Planning; Pat Gervais, Legislative Fiscal Division; Ed Sheehy, Region 2 Deputy Public Defender

### Approval of Minutes from the October 11, 2007 Meeting

Commissioner Donovan corrected the October minutes to reflect that Commission members expressed their concern for Commissioner Nardi, absent from the October meeting due to an accident. The Commission applauded Commissioner Nardi's presence at today's meeting. Commissioner Miller moved to adopt the minutes as amended. Commissioner Veazey seconded the motion. The motion carried.

### Additions to the Agenda

Chairman Taylor added three items to the agenda:

1. Meeting dates for the next calendar year.
2. Appointment of an Executive Committee to act on behalf of the Commission between scheduled meetings.
3. Chief Public Defender Randi Hood's annual evaluation.

### Reports

#### *Chief Public Defender Report*

- *Public Defender Program Update*

Chief Hood received Governor Schweitzer's annual reminder regarding public participation guidelines for state agencies ([exhibit 1](#)). OPD is substantially in compliance with the guidelines. Details of proposed action items will be included in future postings.

After filling all of the Billings positions, OPD was fully staffed for a couple of days ([exhibit 2](#)). System-wide, turnover seems to be within a normal range. Performance appraisals are nearly complete in Region 1 (Kalispell), and are also underway in Regions 9 (Billings) and 4 (Helena). Chief Hood and Administrative Director Harry Freebourn have been discussing future staffing needs and will bring a recommendation to the Commission in preparation for the next legislative session.

The voluntary fee dispute resolution process (for claims that have been adjusted) is being developed. Contract Manager Larry Murphy anticipates recruiting six contract attorneys statewide to review disputes. The contractor would put their complaint in writing and then select two reviewers from the list of six, with the understanding that the reviewers' decision is final.

Chief Hood, Mr. Murphy and Mr. Freebourn continue to meet with contract attorneys around the state to listen to their concerns and provide the opportunity for open discussion. Their next stop will be Miles City, Glendive and Sidney in early December. They were recently in Lewistown, and have been hearing similar comments in every region. These comments include enthusiasm for the Lexis offer; agreement that the "45 day rule" (claims submitted more than 45 days from the last day of the month of service will be denied) is reasonable; positive feedback on OPD training sessions and interest in obtaining sessions on DVD; and disapproval of soft caps. Contractors don't like the \$25 stipend, which doesn't come close to covering costs. Some don't want to have to track actual expenses to be reimbursed, but suggested implementing either a graduated stipend based on the number of cases, or raising the rate \$1 per hour and forgoing the stipend. Mr. Freebourn did a high level estimate that found that increasing the hourly rate for contract attorneys to \$61 would cost approximately \$100,000 more per year. He hasn't calculated the cost of an incremental stipend. Commissioner Hensley asked the Contractor Process and Approvals subcommittee to develop the costs and present proposals at the next meeting. The Commission also requested "hard numbers" regarding the amount currently paid in stipends.

Chief Hood presented the Appellate Defender report ([exhibit 3](#)) on behalf of Chief Appellate Defender Jim Wheelis. Twenty-one briefs were filed in October, and two cases related to probation conditions were argued before the Supreme Court.

The case management rollout is nearly complete. Most OPD staff have already been trained since the success of the system is dependent on how information is entered. The IT staff will continue to work on data cleanup, and policies regarding closing cases are being developed. Attorneys will be expected to close cases on a routine basis, and it will be part of the performance evaluation.

The first issue of the OPD newsletter will be in the mail shortly. Commissioners are invited to submit material and will be included on the mailing list. Chief Hood received feedback that people prefer print copies over an electronic version, so it will be distributed in hard copy. However, recipients will be offered the option to sign up for an electronic version.

- *Union Issues*

Issues before the Labor Management Committee for attorneys include workload issues and developing a career ladder. A pay schedule proposal will go to the union at the end of the month, but funding may have to come from the next legislature. The administrative staff recently voted to organize. Investigators have not yet voted.

- *Discuss Law and Justice Roundtable*

The membership of the Law and Justice Interim Committee, responsible for oversight of OPD, has many new members since the creation of the public defender system. Senators McGee, Perry and Shockley are still on the Committee, and they had a lot to do with the creation of the Montana Public Defender Act. The agenda for the upcoming roundtable discussion ([exhibit 4](#)) was reviewed. The Commission will issue their Fiscal Year 2007 Report to the Governor, Supreme Court and Legislature ([exhibit 5](#)). OPD Mental Health Consultant Dr. Laura Wendlandt will present OPD's Mental Health Protocol ([exhibit 6](#)), developed to help control the quality and the cost of mental health services performed on behalf of OPD clients.

- *Training Coordinator Update ([exhibit 7](#))*

Training Coordinator Eric Olson is very excited about the upcoming bias training to be presented by Andrew King-Ries and others. This is a mandatory interactive training session for all FTE attorneys to promote effective communications between public defenders and their clients. It fulfills the cultural sensitivity training required in the Standards.

Mr. Olson is developing a formal policy and procedure investigation manual and plans to distribute it to OPD staff next week. A Capital Case and Homicide Defense Workshop is planned for late summer to address the shortage of OPD attorneys qualified to handle capital cases (there are currently only four).

- *Financial Update*

Mr. Freebourn presented the financial reports ([exhibit 8](#)). The hope is that the "45 day rule" will provide more predictability in contractor costs. Commissioner Sherwood noted that the contract services in Region 1 are higher than anywhere except Billings. Chief Hood said that it is because they are understaffed in Region 1; she thinks they need at least two more attorneys. There are more cases in Libby and Thompson Falls than were expected, and the costs also include travel to Libby.

Mr. Freebourn will be meeting with Department of Corrections staff to discuss inmate calls. There are several issues involved, including the large number of inmate calling systems and their control of who is on the "free list."

- *IT Update*

Information Technology (IT) Manager Teri Heiland presented the IT Update ([exhibit 9](#)). All offices are now converted to a single JustWare case management database, and continued data clean up is the primary focus. Pre-populated claim forms for contractors and time tracking for FTE attorneys and investigators through JustWare are in the works.

Chairman Taylor asked about staffing needs for the next biennium. Ms. Heiland said that in addition to the four current LAN administrators, she anticipates needing one FTE system administrator to run reports and provide staff support for the case management function, and one FTE “back end” technical position.

SharePoint may be back on the table as the brief bank solution. There have been discussions about using a shared template with the Department of Justice and the Office of the Court Administrator. Each agency would still have separate databases with their own brief banks.

The video conferencing equipment is scheduled for installation in early December. It will include internet access outside of the state network.

#### **Public Comment—Mental Health Protocol**

No public comment was offered at this time.

#### **Reports, continued**

- *Mental Health Evaluation Protocol Update*  
OPD Mental Health Consultant Dr. Laura Wendlandt discussed the feedback she received ([exhibit 10](#)) from approximately a dozen contractors on the Mental Health Protocol. Dr. Wendlandt received consistent feedback to pay a flat fee for sex offender and chemical dependency evaluations, but had comments ranging from one extreme to the other regarding no show and travel rates (from “not an issue” to “want the full hourly rate”). The letters from the National Board for Certified Counselors (NBCC) and the National Fair Access Coalition on Testing were in response to the fact that licensed clinical professional counselors (LCPCs) were omitted from specialized testing services under the screening category in the interim fee schedule (Attachment C of the protocol). This was an oversight and LCPCs will be included in the screening category in the final fee schedule.

To date Dr. Wendlandt has received 25 Memorandums of Understanding (MOU), including mental health providers in every region. Three more are in the mail, and seven are under review. Any changes that the Commission makes today will require an addendum to the MOU for those who have already signed.

Although there has been some criticism of the \$125 rate, so far no one has refused to take cases at that rate. The Commission discussed the rate in terms of comparison to what contract attorneys are paid (\$60 for regular cases and \$120 for death penalty cases), and in relation to parity with prosecutors, who pay whatever the mental health provider bills. Mr. Olson noted that mental health professionals get a lot more work from the defense than they do from the prosecution.

The Commission took the following actions regarding the mental health Protocol and fee schedule:

- Commissioner Hensley moved to set the **hourly rate** at \$125 per hour for psychologists and physicians. Chairman Taylor seconded. The motion carried.

- Commissioner Hensley moved to establish **travel pay** at 50% of the regular hourly rate, not to exceed \$60 per hour, plus mileage and per diem at the state rate. Commissioner Miller seconded. The motion carried.
- Commissioner Nardi moved to establish the **testifying rate** at twice the hourly rate. Commissioner Donovan seconded. Chairman Taylor amended the motion to establish the testifying rate at 150% of the hourly rate. Commissioner Nardi accepted the amendment. There was discussion regarding parity with the rate paid to contract attorneys. Commissioner Miller called the question. The motion carried, establishing the testifying rate at 150% of the hourly rate.
- Commissioner Hensley moved to set a flat fee of \$1250 for **sex offender evaluations**, including the risk assessment. Chairman Taylor seconded. The motion carried.
- Chairman Taylor moved to set a flat fee of \$300 for **chemical dependency evaluations**. Commissioner Holton seconded. The motion carried.
- Commissioner Hensley moved to set the **“no show” rate** at one half hour at the regular rate. Commissioner Veazey seconded. The motion carried.
- Chairman Taylor moved to pay the actual cost of **computer generated scoring fees**. Commissioner Hensley seconded. The motion carried.
- Chairman Taylor moved to put LCPCs back into the fee schedule under the screening section at \$75 per hour; to change the term “Mental Health *Expert*” to “Mental Health *Professional*” throughout the Protocol; and to add NBCC as a referral source on the reference page of the Protocol. Commissioner Miller seconded. The motion carried.

#### **Public Comment—General**

Scott Crichton, Executive Director of the American Civil Liberties Union of Montana (ACLU), updated the Commission on issues before the Law and Justice Interim Committee. The committee is looking at alternatives to prison for drug offenders and others, and would like to see improved delivery systems for mental health services for adults and juveniles both while incarcerated and in the community. Mr. Crichton also said that the ACLU would like to create a dialog with the Commission regarding the ACLU’s work to abolish the death penalty.

#### **Public Comment—Contract Attorney**

No public comment from contract attorneys was offered at this time.

#### **Pro Bono Program**

Chairman Taylor has obtained a preliminary estimate of the cost of providing malpractice coverage for pro bono work. Attorneys Liability Protection Society (ALPS) estimates the cost at \$2100 based on 50 lawyers doing two cases per year, averaging 20 hours per case. Chairman Taylor has also requested an estimate from Complete Equity Markets, and is investigating whether an RFP process would need to be followed.

#### **Discussion of Death Penalty and Clemency Claims**

Two attorneys have submitted claims to OPD for their work as clemency counsel on a case that is several years old. Although Montana statute doesn’t give the client the right to be represented at OPD’s expense, the American Bar Association death penalty guidelines (incorporated in the Standards adopted by the Commission by reference) require that clemency counsel be provided. Chairman Taylor moved to approve payment of the claims with the understanding that the Commission is not setting policy regarding payment of clemency claims, and will review the larger issue at a later date. Commissioner Hensley seconded. The motion carried.

**Lunch/Executive Session – Closed**

Chairman Taylor stated, “The following portion of the meeting relates to matters of individual privacy. As Commission Chairman, I have determined that the demands of the individual privacy clearly exceed the merits of public disclosure. As such, this portion of the meeting will be closed.”

The meeting was reopened to the public following Executive Session.

**Performance Evaluation**

Chairman Taylor applauded Chief Hood for doing a great job and moved to give her a 3% salary increase. Commissioner Veazey seconded. The motion carried.

**Meeting Dates for the Next Calendar Year**

Chairman Taylor will send out proposed meeting dates for four meetings in calendar year 2008.

**Adjourn**

The meeting adjourned at 1:15 p.m. Following adjournment, the Commission departed to meet with the Law and Justice Interim Committee.

*Exhibits 1 – 10 have been posted with these minutes to the Office of the State Public Defender website at:*  
<http://www.publicdefender.mt.gov/>.